

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES A. STEVENSON

Claimant

VS.

DEFFENBAUGH INDUSTRIES

Respondent

AND

HARTFORD ACCIDENT AND INDEMNITY

Insurance Carrier

Docket No. 199,611

ORDER

Respondent and its insurance carrier requested review of the Award dated January 31, 1996, entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument May 23, 1996.

APPEARANCES

Gerald C. Golden of Kansas City, Kansas, appeared for the claimant. Michael J. Haight of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a stipulated 10 percent functional impairment to the left lower extremity. At oral argument, the parties narrowed the issues to the following:

- (1) Whether claimant met with personal injury by accident arising out of and in the course of employment on the date alleged, July 22, 1994.
- (2) Whether claimant gave respondent timely notice of accident.
- (3) Nature and extent of disability.
- (4) Claimant's entitlement to temporary total disability benefits.
- (5) Claimant's entitlement to medical expenses incurred for treatment of the left knee.

Those are the issues now before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

- (1) The Administrative Law Judge found that claimant sustained personal injury by accident arising out of and in the course of employment with the respondent on July 22, 1994. The Appeals Board agrees with that conclusion. The issue before the Administrative Law Judge was whether claimant's torn medial meniscus in the left knee was caused or contributed to by his work or whether it was caused by an accidental injury unrelated to work. Claimant's authorized orthopedic surgeon, Mark J. Maguire, M.D., testified that claimant had a degenerative meniscus injury that could have started years ago or could have resulted from repetitive injury sustained at work. However, he also believed that a job, which required a lot of squatting, climbing, and standing, would contribute to the formation of the tear. The Appeals Board finds that the claimant worked for the respondent for approximately 11 months as a helper on a trash truck. The Appeals Board also finds that the work claimant performed for the respondent required those types of physical activities identified by Dr. Maguire as contributing to the degenerative meniscus tear. Based upon the testimony of Dr. Maguire, who was the only physician to testify, the Appeals Board finds that claimant's left knee injury was more probably than not caused by repetitive mini-traumas sustained by claimant throughout the period of employment with respondent which ended on July 22, 1994. Because claimant sustained mini-traumas to the left knee each and every work day, the last day of work is designated as the date of accident for the period of injury in question.

(2) The Administrative Law Judge found that claimant gave respondent notice of accident within 75 days of its occurrence and that "just cause" existed to excuse claimant's failure to provide notice within the first ten days of the accident. The Appeals Board agrees with that conclusion. Claimant did not know until sometime in August or September 1994 that his knee injury was either caused or contributed to by the work he performed for the respondent. Although claimant alleged he banged his left knee at work on July 22, 1994, he was able to complete the work day and did not experience the knee totally giving out until later that night at home. Under those facts, claimant's ignorance that he had actually sustained a work-related accidental injury constitutes "just cause" under K.S.A. 44-520.

(3) The Administrative Law Judge found that the parties had stipulated to a 10 percent functional impairment to the left lower extremity and the Judge awarded permanent partial disability benefits based upon that rating. The respondent and its insurance carrier contend that they did not stipulate to that functional impairment. When the Administrative Law Judge took stipulations at the regular hearing held on July 11, 1995, the following conversation occurred:

"Judge Foerschler: The parties had agreed, evidently, as to his functional impairment, which I guess was this figure of Dr. MaGuire [sic] of ten percent of the left lower extremity.

"Was that the agreement that was made?

"Mr. Alberg: There was a stipulation on the functional disability rating. Of course, that's all subject to whether or not the Court finds causation in this matter.

"Judge Foerschler: Well, but is that what it was, ten percent, Dr. MaGuire's [sic] rating?

"Mr. Alberg: I believe, so, your Honor.

"Mr. Golden: Yes, your Honor. That's what it was.

"Judge Foerschler: Okay. Well, we didn't appoint an independent medical examiner for this, but we still have to determine, I guess, these other issues. I guess nature and extent of disability isn't really much of an issue if causation is found; right?

"Mr. Alberg: It doesn't appear to be so, your Honor, although I will have one little blurb on that subject as well, but the doctor has rated him at ten percent, and subject to cross-examination, I suppose the Court can find whatever the Court feels is appropriate if the Court finds causation.

"Judge Foerschler: Well, I'm not going to have any other medical testimony, though, other than Dr. MaGuire [sic] -- other than the agreement by Dr. MaGuire [sic]; right?

"Mr. Alberg: I think that's correct, although we may take the first doctor that he saw in this case who was Dr. Clifford Johnson with a clinic out in Bonner Springs.

"Judge Foerschler: Is that who he owes for medical treatment, Mr. Golden?

"Mr. Golden: No, it's Dr. MaGuire [sic].

"Judge Foerschler: Dr. MaGuire [sic] was the treating physician as far as any definitive treatment for Mr. Stevenson?

"Mr. Golden: Yes.

"Judge Foerschler: Okay. Well, I'm going to assume, though, that whatever else you present in the way of evidence, you're not going to present any evidence that he's not ten percent permanently partially disabled as far as his lower extremity?

"Mr. Alberg: No independent evidence other than the doctors that he has himself seen, your Honor.

"Judge Foerschler: Well, that doesn't answer the question. What I'm saying is, are we going to agree that he has functional impairment now of ten percent of the left lower extremity, and the only question is whether he got it at work; is that the question?

"Mr. Alberg: That is the question, your Honor."

The Appeals Board agrees with the Administrative Law Judge that the respondent and its insurance carrier stipulated that claimant had a 10 percent functional impairment to the left lower extremity as a result of the left knee injury and that the only question was whether claimant sustained permanent injury to the knee as a result of a work-related accident. Because that stipulation was not properly withdrawn, it is binding upon the parties for purposes of this award.

(4) Claimant requested an award of temporary total disability benefits from the date of accident until December 21, 1994, when Dr. Maguire released him to return to work. The Appeals Board finds that claimant's request should be granted. Because of the knee injury, claimant did not work between July 22, 1994, and the date he was ultimately released to work by Dr. Maguire. When Dr. Maguire first saw claimant on August 4, 1994, the doctor told claimant he would be off work for a number of weeks. On August 17, 1994, Dr. Maguire recommended surgery which claimant declined. It is unclear whether claimant declined surgery because he believed he could not afford to pay for it or because of other personal reasons. However, it is true that, at that time, the respondent was not providing claimant any medical treatment. Claimant returned to the doctor in October 1994 at which time the doctor prescribed physical therapy which was later extended.

Based upon the above, the Appeals Board finds that claimant was temporarily and totally disabled from July 23, 1994, until December 21, 1994, and is, therefore, entitled to receive temporary total disability benefits for that period.

(5) Claimant requested the medical expense incurred with Dr. Maguire to be paid by the respondent. The Appeals Board finds that respondent had a duty to provide claimant medical treatment once it became aware that claimant's injury was caused or contributed to by claimant's work activities. K.S.A. 44-510(b) provides in pertinent part:

"If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this section, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director."

Although claimant admits he is terrible with dates, the record establishes that at least by September 18, 1994, claimant had advised respondent that the knee injury was work related. That date is established by the testimony of respondent's workers compensation administrator, Tom Steck. Therefore, the medical expense incurred by claimant for left knee treatment before September 18, 1994, is considered unauthorized medical expense and respondent's liability for that expense is limited to a maximum of \$500 as provided by K.S.A. 44-510(c)(2). However, the medical expense incurred by claimant for left knee treatment on and after September 18, 1994, is respondent's responsibility.

The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated January 31, 1996, should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, James A. Stevenson, and against the respondent, Deffenbaugh Industries, and its insurance carrier, Hartford Accident and Indemnity, for an accidental injury which occurred July 22, 1994, and based upon an average weekly wage of \$328.25 for 21.71 weeks of temporary total disability compensation at the rate of \$218.84 per week or \$4,751.02, followed by 17.83 weeks of permanent partial disability benefits at the rate of \$218.84 per week or \$3,901.92, for a 10% functional impairment to the left lower extremity, making a total award of \$8,652.94, which is all due and owing and ordered paid in one lump sum less amounts previously paid.

Claimant is awarded both authorized and unauthorized medical expense consistent with the findings set forth above. Claimant is also entitled to request additional medical care and treatment upon proper application to the Director.

The remaining orders set forth in the Award are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gerald C. Golden, Kansas City, KS
Michael J. Haight, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director